

August 10, 2000

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

ORDER OF DISMISSAL

SUBJECT: Department of Development and Environmental Services File No. **E9901165**

MICHAEL MITCHELL
Code Enforcement Appeal

Location: Waterward of Southeast David Powell Road, approximately
2.1 miles east from intersection with Preston Fall City Road

Appellant: **Michael Mitchell**
6702 – 20th Drive NE
Marysville, WA 98271

Property Owner: Patricia Haney
5720 – 198th St SW #214
Lynnwood WA 98036

Department: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section
Represented by **Manuela Winter**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-7294
Facsimile: (206) 296-7055

1. The appeal hearing for the above referenced code enforcement proceeding was held on August 8, 2000 in the Snoqualmie Room of the King County Courthouse, Seattle, Washington. The hearing was scheduled for 9:30 a.m., but did not open until 10:00 a.m. due to the absence of Mr. Mitchell. Mr. Mitchell arrived at approximately 10:40 a.m., stating that he had been delayed by an auto accident on Interstate-5.
2. The Department of Development and Environmental Services has moved for the dismissal of Mr. Mitchell's appeal on the grounds of his failure to respond to an authorized discovery request by the deadline provided. The pre-hearing order issued in this proceeding on April 5, 2000 authorized the parties to engage in discovery in the form of interrogatories and requests for production. The deadline for serving discovery requests was set at May 26, 2000, with June 2, 2000 the deadline for filing objections to discovery requests, and June 9, 2000 as the deadline for providing discovery responses.

3. Both DDES and the Appellant filed timely discovery requests, and each party filed timely objections to the opposing party's requests. Based on a conference call conducted on June 7, 2000, which entertained argument both on the objections to discovery requests and the motion by the Appellant's attorney for continuance of the July 11, 2000 hearing, the Examiner granted the continuance request, rescheduling the hearing for August 8, 2000 and extending the discovery response deadline to July 17, 2000. These changes were documented within a notice issued by the Hearing Examiner's office on June 20, 2000.
4. DDES complied with the July 17, 2000 deadline for providing its discovery responses to the Appellant. The Appellant, on the other hand, provided no answers or documents to DDES in response to its requests. The Appellant's attorney, when contacted by DDES, averred that she had had no communication with Mr. Mitchell despite numerous attempts to locate him. Mr. Mitchell's attorney withdrew from his representation on July 21, 2000. Mr. Mitchell has made no attempt to comply with the discovery requests propounded by DDES during the period between the July 17, 2000 deadline and the August 8, 2000 hearing date.
5. Mr. Mitchell does not contest the basic assertions within the October 13, 1999 Notice and Order that on or about August 19, 1999 illegal clearing and grading occurred within protected setback areas for the Snoqualmie River at a location adjacent to Southeast David Powell Road, approximately 2.1 miles east of its intersection with the Preston-Fall City Road. The alleged violations entailed clearing and grading within the Class I stream and its buffer, including blocking a side channel subject to fish use, and within the flood plain. In addition, the Snoqualmie River is a conservancy shoreline environment under the Shoreline Management Act. The contested issues, rather, relate to Mr. Mitchell's relationship to the illegal clearing and grading activities; i.e., whether he had an ownership interest in the property, whether the clearing and grading occurred with the permission of the owner, and whether the crew that did the work was operating under Mr. Mitchell's supervision and direction.
6. Many of the production requests and interrogatories submitted to Mr. Mitchell by DDES sought further information describing Mr. Mitchell's relationship to the subject property. Without knowing relevant facts describing Mr. Mitchell's relationship to these issues and having an opportunity through discovery to obtain information with respect thereto, DDES would be seriously prejudiced in its effort to prepare for the code enforcement appeal hearing.
7. Failure by a party to respond fully to a discovery deadline set forth within a pre-hearing order is subject to sanctions under Rule VII.E of the Hearing Examiner Rules of Procedure. The menu of sanctions includes remedies as relatively benign as continuance of the hearing; more harsh restrictions such as exclusion of testimony or studies, modification of the burden of proof, and the directed admission of specific facts subject to the discovery request; and culminates with the ultimate sanction of dismissal of the appeal.
8. While dismissal of the appeal is a harsh remedy, its use in this instance is warranted. From the outset of this proceeding, Mr. Mitchell's primary strategy has been to engage in delaying tactics. He obtained two continuances of the pre-hearing conference, then a continuance of the scheduled hearing date, including an extension of the discovery response deadline. Despite this flexibility and generous latitude, in the end Mr. Mitchell

- neither responded to the discovery requests in any form nor co-operated with his attorney in the preparation of such responses. Indeed, until just shortly before the hearing date, it appears that neither his attorney nor anyone else knew of Mr. Mitchell's whereabouts.
9. In view of the egregious nature of Mr. Mitchell's non-compliance with discovery requirements, combined with the complete absence of any serious effort on his part to participate co-operatively in the pre-hearing process, dismissal of the appeal is an appropriate remedy. There is no basis at all for concluding that a further continuance of this proceeding would result in anything more than additional fruitless delay. In view of the substantial public interest in protecting the Snoqualmie River and its salmonid resource, further delay cannot be justified and ultimately would only impede the remediation process. Therefore, dismissal of the appeal is the appropriate sanction to be applied.
10. In addition to consideration of the DDES motion for sanctions, at the August 8, 2000 public hearing the DDES staff exhibits were admitted to the record. These exhibits are sufficient to establish a *prima facie* case that illegal clearing and grading activity occurred at the Southeast David Powell Road site adjacent to the Snoqualmie River on or about August 19, 1999 (see Exhibit Nos. 5, 7, 8, 9, 10, 14, and 36.) In addition, there is ample evidence linking Mr. Mitchell to the property and to the illegal clearing and grading activities (see Exhibit Nos. 7, 30, 32, 33, 34, 35, and 36.)

ORDER:

The code enforcement appeal of Michael Mitchell is DISMISSED with prejudice. The Notice and Order issued in this proceeding on October 13, 1999 is reinstated with full force and effect.

ORDERED this 10th day of August, 2000.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 10th day of August, 2000, by certified and first class mail to the following party:

Michael Mitchell
6702 – 20th Drive NE
Marysville WA 98271

TRANSMITTED this 10th day of August, 2000, by first class mail to the following parties and interested persons:

DOT Inc
320 - 108th Ave NE #304
Bellevue WA 98004

Patricia Haney
5720 - 198th St SW #214
Lynnwood WA 98036

Melissa McCarthy Houser
4223 - 163rd Avenue SE
Bellevue WA 98006

TRANSMITTED this 10th day of August, 2000, to the following parties and interested persons:

Manuela Winter DDES/LUSD Site Development Services MS OAK-DE-0100	John Briggs KC Prosecuting Attorney Civil Division MS KCC-PA-0554	Stephen Conroy DDES/LUSD MS OAK-DE-0100
Elizabeth Deraitus DDES/BSD Code Enforcement Section MS OAK-DE-0100	Randy Sandin DDES/LUSD Site Development Services MS OAK-DE-0100	Fred White DDES/LUSD Site Development Services MS OAK-DE-0100

MINUTES OF THE AUGUST 8, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9901165 – MICHAEL MITCHELL:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Manuela Winter, John Briggs and Stephen Conroy. Participating in the hearing and representing the Appellant was Michael Mitchell. There were no other participants in this hearing.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Corrected Notice & Order, dated October 13, 1999
- Exhibit No. 2 Michael Mitchell Appeal of Notice and Order, dated October 20, 1999, received at DDES October 25, 1999
- Exhibit No. 3 Printout of King County Assessor's records on July 24, 2000, showing Patricia Haney as the taxpayer of record
- Exhibit No. 4 GIS map showing location of property and approximate location of sensitive areas on and around the site
- Exhibit No. 5 September 2, 1999 photos taken of site by Manuela Winter
- Exhibit No. 6 September 2 and 8, 1999 sketch and field notes by Manuela Winter
- Exhibit No. 7 Information about the violation forwarded to Ms. Winter by Carol Bordin on September 9 and 16, 1999
- Exhibit No. 8 Sketch of site that Ms. Bordin prepared based on her site investigation prior to the September 17, 1999 inter-agency on-site meeting
- Exhibit No. 9 Rough notes and sketch taken by Ms. Winter during the September 17, 1999 meeting
- Exhibit No. 10 Photos taken during the September 17, 1999 meeting
- Exhibit No. 11 Voluntary Compliance Agreement DDES sent Mr. Mitchell and DOT, Inc. on September 22, 1999
- Exhibit No. 12 Ms. Bordin's September 17, 1999 letter to Mr. Mitchell e-mailed to Ms Winter on September 17, 1999
- Exhibit No. 13 Representative example correspondence documenting agency coordination and attempts to coordinate with Mr. Mitchell and DOT, Inc.
- Exhibit No. 14 Photos from October 29, 1999 site visit
- Exhibit No. 15 Photos from abatement conducted on November 3, 1999
- Exhibit No. 15a. Photos of site taken on November 16, 1999 after first flood event after abatement conducted
- Exhibit No. 16 December 6, 1999 Notice of Pre-Hearing Conference
- Exhibit No. 17 E-mail exchange over Mr. Mitchell's request for a continuance of the Pre-Hearing Conference
- Exhibit No. 18 December 17, 1999 Order of Continuance of the Pre-Hearing Conference
- Exhibit No. 19 February 2, 2000 fax and e-mail with attachment from Ms. Winter to the Hearing Examiner
- Exhibit No. 20 February 11, 2000 Notice of Pre-Hearing Conference
- Exhibit No. 21 Photos taken during January 18, 2000 site visit
- Exhibit No. 22 January 28, 2000 letter from the Corps of Engineers to Mr. Mitchell

- Exhibit No. 23 February 22 & 24, 2000 e-mail correspondence on Mitchell and DOT, Inc. addresses, and DOT, Inc. receipt of correspondence
- Exhibit No. 24 February 29, 2000 request by Mr. Mitchell to the Hearing Examiner for another continuance of the Pre-Hearing Conference for this case
- Exhibit No. 25 March 1, 2000 e-mail from DDES to the Hearing Examiner regarding Mr. Mitchell's February 29, 2000 request
- Exhibit No. 26 March 3, 2000 Notice of Continuance rescheduling the Pre-Hearing Conference to April 4, 2000
- Exhibit No. 27 April 5, 2000 Pre-Hearing Order
- Exhibit No. 28 April 25 & 26, 2000 e-mail exchange on Mr. Mitchell/Ms. Knapp extension request and April 26, 2000 Order Extending Deadlines
- Exhibit No. 29 Mr. Mitchell's/Ms. Knapp's Motion to Dismiss received by DDES on April 26, 2000, including Declaration of Michael Mitchell dated April 14, 2000
- Exhibit No. 30 DDES's Response to Motion to Dismiss, including Affidavits from Ms. Winter, Ms. Bording, Officer Macrae, Dr. Conroy, Mr. Caskey, Ms. Velikanje, Ms. Borden and Mr. Corey (without copy of referenced Motion to Dismiss)
- Exhibit No. 30a. Mitchell's Reply in Support of Motion to Dismiss received by DDES on May 17, 2000
- Exhibit No. 31 May 26, 2000 Order Denying Motion to Dismiss
- Exhibit No. 32 June 28, 2000 fax from Mr. Houser that has two option documents between DOT, Inc. and Mr. Mitchell for the property in question.
- Exhibit No. 33 June 6, 2000 e-mail from Ms. Bordin regarding her conversation with Mr. Houser
- Exhibit No. 34 May 24, 2000 memo from Mr. Granlund regarding the violation, and site visit and conversations with Mr. Mitchell
- Exhibit No. 35 July 12, 2000 memo from Kirk Anderson regarding the violation, and site visit and conversations with Mr. Mitchell
- Exhibit No. 36 Affidavit of Jerry Hanley dated July 11, 2000
- Exhibit No. 37 Affidavit of Jere Crosby dated July 12, 2000
- Exhibit No. 38 King County's First Interrogatories and Requests for Production to Appellant
- Exhibit No. 39 Mitchell's First Interrogatories and Requests for Production and May 30, 2000 letter from Ms. Knapp informing Ms. Winter of the need for more than a month continuance of the hearing
- Exhibit No. 40 Mitchell's Objections to King County's First Interrogatories and Requests for Production
- Exhibit No. 41 June 2, 2000 DDES request for extension to respond to discovery request
- Exhibit No. 42 June 20, 2000 Notice of Rescheduled Public Hearing
- Exhibit No. 43 DDES July 17, 2000 response to discovery request
- Exhibit No. 44 Additional data received from Ms. Velikanje regarding discovery request
- Exhibit No. 45 July 21, 2000 letter from Ms. Knapp withdrawing as counsel for Mr. Mitchell
- Exhibit No. 46 July 24, 2000 letter from Hearing Examiner to Mr. Mitchell
- Exhibit No. 47 July 21, 2000 letter from Doug Dobkins to Ms. Winter regarding Mr. Mitchell's ongoing permit efforts with DDES for another project
- Exhibit No. 48 Two newspaper articles on Mr. Mitchell, The Seattle Times 2/6/97 and 10/1/97.
- Exhibit No. 49 DDES staff report to the Hearing Examiner, dated July 25, 2000